LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 21 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1092

JACK MARRIN WILLIAMSON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JAMES P. COLEMAN,
Ackerman, Mississippi,
Attorney for Petitioner.

INDEX.

	Page
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	6
APPENDIX	9

TABLE OF AUTHORITIES.

Cases:

McNabb v. United States, 1943, 318 U. S. 332, 340 5

United States v. California Co-op Canneries, 279 U.S. 553, 73 L. Ed. 838; 49 S.Ct. 423 4

Miscellaneous:

United States Code, Section 5205 (a) (2), Title 26 2

United States Code, Section 5604 (a) (1), Title 26 2

28 USC 1254 (1) 2

Rules of the Supreme Court Rule 19 (1) (b) 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. .....

JACK MARRIN WILLIAMSON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in this case on January 25, 1965, 340 Fed. 2d 612, and on which a Petition for Rehearing was denied without opinion, on March 22, 1965.

The opinion of the Circuit Court of Appeals of January 25, 1965, as well as its prior opinion of December 27, 1962, 311 Fed. 2d 441, are printed in the Appendix hereto.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED.

Is evidence obtained by the Government through the agency of an informer who had been employed on a contingent fee basis to apprehend the Defendant in a crime not yet committed admissible against that Defendant?

Petitioner believes this to be "an important question of federal law which has not been, but should be, settled by this Court", within the meaning of Rule 19 (1) (b) of the Rules of the Supreme Court.

STATEMENT OF THE CASE.

The Petitioner was indicted for the possession of 179 gallons of whiskey in containers not having stamps affixed thereto as required by Section 5205 (a) (2), Title 26, United States Code; in violation of Section 5604 (a) (1), Title 26, United States Code. Upon conviction, he appealed to the United States Court of Appeals for the Fifth Circuit. The conviction was reversed, 311 Fed. 2d 441 (No. 19,382 in the Court of Appeals). A petition for rehearing was denied.

The evidence necessary to convict had been obtained through the agency of an informer who had been employed, on a contingent fee basis, to apprehend the Defendant in a crime not yet committed.

In reversing the original conviction for further proceedings not inconsistent with the opinion of the Court, it was held:

That the evidence obtained by the use of Moye would be admissible only if it were shown (1) the Government investigators had certain knowledge that Williamson was engaged in illicit liquor dealings; and (2) that the investigators carefully instructed Moye on the rules of entrapment and had it clearly understood that Moye would not induce the Defendant to commit a crime, but was simply offering him an opportunity to do so.

After reversal, the case was tried the second time before the District Judge, without a jury.

At that second trial the Government made no effort to meet either of the above requirements. As if there had never been a ruling by the Court of Appeals on the admissibility of the evidence, the prosecutor presented the agent, Mr. Robert E. Lee, who gave the same testimony as at the former trial.

At the proper point, the Defendant objected to its admissibility, citing the ruling of the Court of Appeals (R. 15-18). The Court reserved ruling on the objection. After the Government rested without making any effort to render the testimony admissible, the trial judge overruled the motion to exclude.

The Defendant took the position that Lee's testimony had already been condemned by the Court of Appeals,

and rested. Thereupon, on the sole basis of Lee's Testimony, the Court convicted Williamson.

Williamson again appealed, but the Circuit Court of Appeals held that since Moye's deposition was not used in the second trial the conditions prescribed by the former opinion were not pertinent, and the Government was not required to meet them.

The Court of Appeals further said: "Nor was there any evidence which the Trial Judge knew either judicially, actually, or factually which indicated that the initiation or prosecution of this case was the fruit of any illegal contingent agreement with Moye".

With deference, Petitioner is unable to understand this, in view of *United States v. California Co-op Canneries*, 279 U.S. 553, 73 L. Ed. 838; 49 S. Ct. 423, holding that a Federal Court judicially knows its own record.

A Motion for Rehearing was filed in which Petitioner contended "that the decision rendered in *Williamson v. United States*, 5th Cir., 1962, 311 F. 2d 441, was directed to the fruits of the contingent fee employment of the informer, Moye".

This was overruled without opinion.

ARGUMENT.

Reasons for Granting the Writ.

We feel that what the Court of Appeals said in its original opinion should be and is the law, and that the Court should have enforced its own opinion to that effect on the second appeal:

> "Without some justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed".

Under the principles settled in *McNabb v. United States*, 1943, 318 U. S. 332, 340, and its progeny, however, "it becomes the duty of the Courts in federal criminal cases to require fair and lawful conduct from said agents in furnishing all evidence of crimes. Moye's testimony, standing alone and unexplained, discloses a form of employment of an informer which this Court cannot approve or sanction".

We feel that the second appeal, before a different panel, did not enforce the sound rule of law announced by the same court on the first appeal.

CONCLUSION.

We, therefore, respectfully pray the Supreme Court of the United States to review the judgment of the Court of Appeals and to settle the questions here raised.

Respectfully submitted,

.....

JAMES P. COLEMAN,
Ackerman, Mississippi,
Attorney for Petitioner.

CERTIFICATE.

I, James P. Coleman, the Attorney for Jack Marrin Williamson, the Petitioner herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the .... day of April, 1965, I served five copies of this printed Petition upon Honorable H. M. Ray, United States Attorney, Oxford, Mississippi, by mail in a duly addressed envelope, postage prepaid.

.....

JAMES P. COLEMAN,
Attorney for Jack Marrin
Williamson.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19382

JACK MARRIN WILLIAMSON and MORRIS LEE LOWREY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(December 27, 1962)

Before RIVES, CAMERON and BROWN, Circuit Judges.

RIVES, Circuit Judge: Williamson and Lowrey were convicted of possessing 179 gallons of whiskey in unstamped containers in violation of section 5604(a)(1), Title 26, United States Code. Williamson was also convicted of carrying on the business of a wholesale liquor dealer and willfully failing to pay the special tax required by law in violation of Section 569 (a), Title 26, United States Code. The specifications of error claim (1) unlawful entrapment, (2) prejudicial argument of the United States Attorney, and (3) insufficient evidence of identity of each of the defendants. There was clearly sufficient evidence of identity of the defendants. The claimed prejudicial argument of the

United States Attorney need not be discussed because we think that the judgments must be reversed on the issue of entrapment.

The circumstances of the claimed unlawful entrapment were developed in the deposition of Robert Harris Moye, a Government informer, taken by agreement between the Government and the defendants on March 31, 1961, several months before the trial. Moye had been released from a federal prison on September 12, 1960 after serving three years for violating the Internal Revenue laws relating to whiskey. Within a few weeks after his release, he contacted two investigators for the Alcohol and Tobacco Tax Division of the Treasury Department. Neither of these investigators testified as a witness in this case, and Moye's testimony as to the terms of his employment is not disputed. Because of its unusual nature, we quote at some length from Moye's deposition.

"MR. COLEMAN:

"Q. All right, now, sir, before we go into that, why did you call him, what was your reason for calling Mr. Rainer?

"A. Because I wanted to make some money, I had been in the penitentiary three years and not a bootlegger helped me one bit in the world and not a one of them paid me a nickel he owed me, or paid my wife.

"Q. So your proposal was that you would go to work for Mr. Rainer and them for pay?

"A. That's right.

"Q. Now then, did he come down and put you to work?

"A. He come down and Mr. Morris was the man that hired me.

"Q. But did Mr. Rainer come with him?

"A. Yes, sir, come down and introduced him.

"Q. How were they to pay you? Let me put it that way.

"A. How was he to pay?

"Q. Yes, sir, how were you to be paid, what was the agreement?

"A. I was to be paid $200.00 for Big Boy, $200.00 for James McBride, $100.00 for Hogie, he's Big Boy's half brother.

"Q. All right, sir.

"A. And $10.00 a day and my gas expenses.

"Q. You had a perfect right to make that trade with them, I'm just trying to get the facts about it. Now what I want to know is about when was that trade made, Mr. Moye?

"A. Well, I couldn't say.

"Q. Had you been home two weeks?

"A. It was a couple or three weeks.

"Q. After you came home?

"A. Yes, sir.

"Q. In any event, it was before Mr. Jack Williamson was arrested, wasn't it?

"A. Yes, sir.

"Q. What did you agree to do with Mr. Rainer and Mr. Morris? What did they tell you they wanted you to do?

"A. They told me to give them the major violators and told me what they'd pay for them.

"Q. For you to go out and catch them, in other words?

"A. If I could catch them.

"Q. And they agreed to pay you $200.00 as to Jack Williamson?

"A. Yes, sir.

"Q. You all called him Big Boy, I believe?

"A. Yes, sir.

"Q. And $100.00 as to his half brother, the Lowrey boy?

"A. Yes, sir.

"Q. When were they to pay you the money?

"A. Wasn't nothing said about when it was to be paid.

"Q. But in the meantime they would also pay you $10.00 per day to work as an undercover agent for them and for the government?

"A. That's right.

"Q. And they did pay you the $10.00 a day?

"A. Yes, sir.

"Q. After you had made this arrangement with Mr. Rainer and with Mr. Morris, was there any kind of a written agreement or anything on it?

"A. No, sir.

"Q. Just a verbal understanding with those two gentlemen?

"A. Yes, sir.

. . . . . .

"Q. Did you get the $200.00 that had been promised to you for catching Mr. Williamson?

"A. Yes, sir.

"Q. Did you get the $100.00 that was promised to you for catching the other boy?

"A. Yes, sir.

. . . . . .

"Q. When was Jack Williamson's name first mentioned to you, Mr. Moye?

"A. When Mr. Rainer brought Mr. Morris to my house.

"Q. And who first mentioned his name?

"A. Mr. Rainer, I believe, told me, introduced us and says, 'He wants to talk to you about Big Boy Williamson,' says 'Do you know him, do you know Big Boy Williamson?' and I says, 'Yes', and he says, 'How well do you know him?' I says, 'Well, well enough,' so Mr. Morris started talking.

"Q. What did he say?

"A. Well, he just told me if I could catch him it would be $200.00, it would be $100.00 for Hogie, and $200.00 for little man, that's his twin brother."

A week or two later Moye traveled a distance of between 75 and 100 miles to Williamson's home. On Moye's first visit Williamson was not at home. Mrs. Williamson told Moye that her husband didn't have any whiskey. The following Sunday morning Moye returned with one Hubert Hocutt, a close friend of Williamson.

"A. I knew that Hubert knowed more about Big Boy than I did, and I knew if I carried Hubert there and Hubert told him that I was all right, that he was going to do business with me."

"A. I told him I wanted some whiskey, that I wasn't able to go in the woods, and I wasn't going in the woods any more for a while until I got in better shape than I was in, and he said he would have some and he would come to Greenwood and let me know, so he came and let me know and—

"Q. Just a minute now. What did he say about having any liquor on that particular occasion?

"A. Said he didn't have any.

. . . . . .

"Q. And then after you left there on Sunday, when did you next see Mr. Williamson?

"A. I believe it was on the next Friday, Thursday or Friday.

'Q. All right, sir, then what happened?

"A. Well, he come and told me he wouldn't pull less than 200 gallons, and I told him, I says, 'Well, I wanted 150, but I will take the 200.' And he says, 'Mr. Bob, you know I want my money when I deliver the stuff.' I says, 'I have got your money,' and I says, 'Let me know so that I can get the money out of the bank,' I says, 'I have been robbed once,' and he said he would do that, so he came to my house the night of the 14th—well, yes, the night of the 14th, but I would say it was about 2:00 o'clock.

"Q. Over in the morning of the 15th?

"A. Yes, sir. And he said, 'A highway patrol car is parked up the highway here,' and says 'I was scared to come by,' says 'I have got the whiskey car stashed,' and he says, 'I want you to come go back by with me.'

Moye and an investigator named Robert E. Lee, who was on undercover assignment, accompanied Williamson to a point where Williamson blew the horn of his car, whereupon Lowrey drove from off the road a Mercury car loaded with 179 gallons of moonshine whiskey. Lee "witnessed Bob Moye pay Jack Williamson $716.00 which I had given him earlier that night." Lee further testified:

"Q. . . . After this payment took place, Mr. Lee, what, if anything, did you do?

"A. Well, Jack Williamson carried Bob Moye and I back to the residence of Moye in Greenwood, and on the way back of course it was just talking and Jack Williamson made the statement in my presence, he turned to Bob and said, Uncle Bob, you going to have to know who you sell to. He said, they send somebody up to try to make a buy off of me every month."

On April 11, 1961, several months before the trial in September, the defendants' attorney, on the basis of Moye's deposition, requested the court to rule as a matter of law that the defendants had been entrapped. The court reserved its ruling and thereafter at the close of the evidence denied the defendants' motions for judgment of

acquittal. The court ruled that no defense of entrapment could be presented for Lowrey, but submitted the issue of entrapment as to Williamson on a full and fair charge to which defendant's counsel made no objection.

Under the law of entrapment as developed in prior decisions of the Supreme Court[1] and of this Court[2] no reversible error would appear except for the evidence of employment of the informer Moye on a contingent fee basis.

The uncontradicted and unexplained testimony as to the terms of Moye's employment make it necessary that the judgments of conviction be reversed. It may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis, $200.00 for Williamson and $100.00 for Lowrey, to produce the legally admissible evidence against each of them. It may be also that the investigators carefully instructed Moye on the rules against entrapment and had it clearly understood that Moye would not induce them to commit a crime, but would simply offer them an opportunity for a sale. None of these facts or circumstances were developed in the evidence, though Moye's deposition had been taken months before the trial.

---

[1] Sorrells v. United States, 1932, 287 U. S. 435; Sherman v. United States, 1958, 356 U. S. 369.

[2] See Gargano v. United States, 5 Cir., 1928, 24 F. 2d 625; Demos v. United States, 5 Cir., 1953, 205 F. 2d 596; Accardi v. United States, 5 Cir., 1958, 257 F. 2d 168; Suarez v. United States, 5 Cir., No. 19049, m/s.

Without some such justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed.[3] Such an arrangement might tend to a "frame up," or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.

No case has been cited by either of the parties involving a contingent fee agreement like that to which Moye testified, and we have found none. Under the principles settled in *McNabb v. United States*, 1943, 318 U. S. 332, 340, and its progeny,[4] however, it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes. Moye's testimony, standing alone and unexplained, discloses a form of employment of an informer which this Court cannot approve or sanction.

Moye made the purchase from Williamson and produced the evidence against both Williamson and Lowrey. For such services the Government agents paid Moye as to Williamson $200.00, and as to Lowrey $100.00. *McNabb, supra*, and its progeny clearly forbid the Government to make use of the fruits of wrongdoing by its officers or agents.

Moye's deposition standing alone furnishes prima facie evidence of wrongdoing on the part of the Government

[3] The sale of the 179 gallons of moonshine whiskey occurred on October 15, 1960, some weeks after Moye's employment.

[4] See Mitchell v. United States, 1944, 322 U. S. 65, 70, 71; Upshaw v. United States, 1948, 335 U. S. 410; Mallory v. United States, 1957, 354 U. S. 449.

investigators in employing Moye on a contingent fee basis. Lacking any contradiction, justification or explanation of such a basis of employment, the convictions of the defendants resulting from Moye's services cannot be sustained. The judgments are therefore reversed and the cases remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

JUDGE CAMERON DISSENTING and
JUDGE BROWN CONCURRING SPECIALLY.

BROWN, Circuit Judge, Concurring Specially:

I concur in the result and in the Court's opinion. And it is evident that I agree with much that is said in the dissent.

I do not think, however, that this is an aspect of entrapment. Its kinship to entrapment is not that the act of a Government representative induced the commission of a crime. Rather, it is that the means used to "make" the case are essentially revolting to an ordered society.

For Government to offer a specific sum of money to convict a specified suspect is really more than civilized sensibilities can stand. But in condemning such conduct by the decisive weapon of a reversal, we ought to be aware that there may be equally offensive actions which are less spectacular.

Thus, as the dissent emphasizes so well, the "contingent fee" for a narcotics addict hardly needs to be spelled out in the terms used to trap this moonshiner. To get the stuff to feed his uncontrollable appetite, he knows that he must produce results or he will no longer be "hired" as one euphemistically referred to as a "special employee" but who are better known in the literature of crime as stool pigeons. The pressures which this insatiable appetite generates require that the rights of an accused be carefully protected lest an innocent person become the victim of the "contingent" informer's overpowering physical dependence on the availability of drugs. This may well require inquiry into the methods used, the circumstances under which an addicted informer is utilized, the nature of the instruction given, the standards laid down to test the sufficiency of his performance upon which his reward is to be based, or the like.

What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough--it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular.

CAMERON, Circuit Judge, Dissenting:

I agree with the contention of the United States here that the evidence does not tend to establish entrapment as that term has been usually accepted by this Court. Cf. *Accardi v. United States*, 1958, 257 F. 2d 168, 172;

Vamvas v. United States, 1926, 13 F. 2d 347, 348; and *Park v. United States*, 1960, 283 F. 2d 253, 254. What we said in the last mentioned case sums up the rule recognized by this Court: "Nothing here established that the agents lured and induced the commission of the offense rather than affording an opportunity to persons of ready willingness and complaisance to enter into the unlawful transaction."

The majority, in reality, reverses this case because of the ignoble part assigned by the Government to the informer Moye. The sole basis of the reversal is that Moye was working on a contingent fee basis.[1] He was paid a nominal salary and furnished gasoline and was to receive $200.00 if he made a purchase from one of these defendants leading to his conviction and $100.00 if he made a like purchase from the other.

In the majority's view, the very fact of hiring an informer on a contingency is ignoble. Such a holding would rob the Government of one of its most effective weapons in detecting crime and bringing to the bar of justice those who commit it.

For decades the use of informers has been accepted as a proper means of enforcement of the criminal law. It is recognized by all as one of the most important means.

[1] The basis for the reversal which the majority apparently accept is thus stated in the appellants' brief:

"We respectfully urge that all entrapments accomplished by an informer working for a contingent financial fee should be outlawed as being incurably afoul of public policy and not to be permitted under our form of government."

And, in practically all instances, the informer is in reality on a contingent basis.

The method chiefly used in apprehending sellers of narcotics, for instance, is the employment of addicts to make the purchases from suspects in the presence of federal officers who are secreted or in disguise. Every such informer knows that his day to day arrangement with the Government will continue only if he delivers the goods. The addict is given barely enough money to live on and supply his need for narcotics for a few days. In most cases, the Government agents are after one or more individuals to whom the informer is sent. If the addict succeeds in landing some of the criminals the Government is after, he is well paid and his services will continue. If he does not, he is dropped. As far as I know, the courts have accepted such practices as permissible. The same attitude has prevailed in connection with informers in the apprehension of liquor law violators.

Those who represent persons charged with crime have for ages made impassioned pleas—mostly to juries—that the hiring of informers, in many cases friends of the victims being sought, is dirty business. Crime itself is dirty business, and the universal experience of law enforcement officers is that the use of informers is necessary to the enforcement of law.

Not only the courts but the Congress has put its stamp of approval, under conditions like those present here, on the employment of informers in the enforcement of the Internal Revenue Laws. Cf. Internal Revenue Code, 1954,

§ 7623. It is common knowledge that, based upon that statute, those charged with the responsibility of collecting the government revenues make it a practice of rewarding, contingently, individuals who "squeal" on those from whom sums are collected through information furnished by the "squealer." It is commonly accepted that the one who informs is given ten percent of the take. By § 7214 (a) of the Code, the discretion is given to a court imposing sentence on a revenue agent or employee convicted as the result of information furnished by an informer, to award the informer a portion of the fine imposed not in excess of one-half thereof.

At a time when crime of all sorts is so definitely on the increase, I am not willing to weaken the hand of the law by interfering with a practice as well established as the one here under examination. Juries generally take into account the interest of every witness who testifies before them. What we are really dealing with here is the weight of the testimony of an interested witness employed as an informer. The juries can be counted upon to make proper discount in crediting the testimony of an informer employed on a contingent basis. It is their function to determine the extent of the discount. I do not think we ought to take such a witness off of the stand entirely. I respectfully dissent.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21671

JACK MARRIN WILLIAMSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(January 25, 1965.)

Before BROWN and BELL, Circuit Judges, and HUNTER, District Judge.

PER CURIAM: On the retrial of this case, as our mandate plainly called for, the deposition of Moye was not offered by either party for any purpose. Consequently, conditions (1) and (2) prescribed by our former opinion, *Williamson v. United States,* 5 Cir., 1962, 311 F.2d 441, were not pertinent, and the Government was not required to meet them. Entrapment as such on this record was not therefore raised. Nor was there any evidence which the Trial Judge knew either judicially, actually, or factually which indicated that the initiation or prosecution of this case was the fruit of any illegal contingent agreement with Moye. On the intrinsic merits, the evidence amply sustained the finding of guilty.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 21671.

JACK MARRIN WILLIAMSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

ORDER:—

IT IS ORDERED that appellant be granted an extension to and including March 15, 1965, within which to file a petition for rehearing in the above entitled and numbered cause.

(S.) JOHN R. BROWN,
U. S. Circuit Judge.

(ORIGINAL FILED FEB. 12, 1965)

United States Court of Appeals
Fifth Circuit

Office of the Clerk

March 22, 1965

Edward W. Wadsworth
Clerk

Room 408 - 400 Royal St.
New Orleans, La. 70130

Re: No. 21671—Jack Marrin Williamson
-vs- United States of America.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

Mr. James P. Coleman
Attorney at Law
Ackerman, Mississippi

Hon. H. M. Ray
U. S. Attorney
Oxford, Mississippi

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1092

JACK MARBIN WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. 23) is reported at 340 F. 2d 612. A prior opinion is reported at 311 F. 2d 441.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1965. A petition for rehearing was denied on March 22, 1965. The petition for a writ of certiorari was filed on April 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

775-282—65

QUESTION PRESENTED

Whether the court of appeals properly interpreted its earlier opinion reversing a prior conviction as it relates to the defense of entrapment.

STATEMENT

Petitioner and two others were charged in an indictment returned in the Northern District of Mississippi with possession of 179 gallons of whiskey in unstamped containers, in violation of 26 U.S.C. 5604(a)(1). At the first trial, the government, with the consent of the defendant, took the deposition of an informant, Mr. Moye, and introduced it as part of the prosecution's case (1 R. 96-101).[1] Mr. Moye testified that, on September 12, 1960, following his release from the penitentiary, he communicated with a government agent because he wanted to make some money and because no bootlegger had assisted him during his confinement. Two agents agreed to pay him $10 a day and additional sums of $200 and $160 respectively if they caught petitioner and his half-brother. A week or two later Moye, using a close friend of petitioner's to vouch for him, arranged to buy some moonshine whiskey from petitioner. 311 F. 2d at 442-444. On October 15, 1960 at 1:30 a.m., petitioner sold Moye 179 gallons of moonshine whiskey for $716. An undercover agent, Robert E. Lee, witnessed the transaction and drove with petitioner and Moye to the place where the transfer took place (1

[1] The designation of "1 R." refers to the record of the first trial, "2 R." to the present record.

R. 104–107). The government rested its case on the deposition of Moye and the testimony of agent Lee. The defense presented no testimony. At the conclusion of the case, the court submitted the question of entrapment to the jury (1 R. 128), which returned a verdict of guilty.

On appeal, the court of appeals (one judge dissenting) ruled that the uncontradicted and unexplained testimony as to the terms of Moye's employment required reversal. The leading opinion stated that it was possible that the contingent fee was justified, *i.e.*, it was possible that the investigators had instructed Moye concerning the rules against entrapment and it may have been clearly understood that he was not to induce a crime, but that none of the facts and circumstances were developed by the evidence. 311 F. 2d 441.

2. The second trial was heard by the court without a jury. Before the trial commenced, the court inquired if it should consider the transcript of the testimony on the former trial and then develop the record further on the issue whether the informer "was, in effect, corrupted and thus corrupted the defendants in the contingent fee arrangement apparently made for his services?" (2 R. 12). The government responded that Moye's testimony should be treated as part of the defendant's case since entrapment was a defense. Petitioner would not agree to this condition and suggested "that the government just go on and put on its case as it sees fit and we'll see where we get to." (2 R. 12–13). The govern-

ment then called agent Lee as a witness. When Lee was asked if he had conversed with Moye and petitioner on October 15, 1960, petitioner objected. He contended that Lee's testimony was not admissible under the ruling of the court of appeals until it was shown that the agents had knowledge that petitioner was engaged in illicit liquor dealings and that the agents had instructed Moye on the rules of entrapment (2 R. 15–16). The government indicated that it did not oppose this requirement. It pointed out, however, that the defendant had a right not to raise the defense of entrapment. Noting there was no evidence at this trial of any contingent fee arrangement, it suggested that petitioner introduce the deposition of Moye to support his contention (2 R. 16–18). The court reserved its ruling on the objection (2 R. 18). Lee then described petitioner's sale of the moonshine whiskey to Moye (2 R. 18, 22).

The government, before resting, stated that if the court considered that it had the deposition of Moye before it, it would proceed further in accordance with the ruling of the court of appeals. When the court replied that it did not, the government rested. Petitioner, asserting that the court should take judicial notice of the deposition on file in the case, moved to strike Lee's testimony and contended that the ruling of the court of appeals made his testimony incompetent. The court rejected this contention on the ground that the former record would not have been available to a jury and that it was hearing the case as a jury (2 R. 24–25). Petitioner then rested.

The government then stated that, if the defense had raised the issue of a contingent fee, it had witnesses present to testify "on that point to overcome what we think the Circuit Court of Appeals has raised" (2 R. 26-27). The court thereupon found petitioner guilty (2 R. 29-30). The court of appeals affirmed the conviction.

ARGUMENT

Petitioner raises the question whether the district court and the panel of the court of appeals which affirmed the present conviction properly interpreted the prior opinion of the court of appeals, reported at 311 F. 2d 441, as it bears on the defense of entrapment. If it did, then, as both courts below have held, the issue as to the informer is clearly not now present in this case for petitioner, although given every opportunity to do so, failed to raise any issue as to entrapment or the use of the informer which would make it incumbent upon the government to produce the evidence of justification which it stated it had available and was ready to produce. The district court also indicated that it was ready to pass upon the question as it would if the issue had been raised in a case in which a jury had not been waived, *i.e.*, where the defendant put in some evidence to raise it. Petitioner deliberately chose not to raise the issue.

We believe that the district court and the court of appeals correctly interpreted the prior opinion of the court of appeals. A majority of the original panel—Judge Rives, the author of the leading opinion, and

Judge Cameron—unquestionably treated the matter as one of entrapment. Judge Brown, the third member of the original panel, manifestly deemed the leading opinion as based on entrapment since his special concurrence explained why he viewed the matter otherwise. It is significant that Judge Brown was on the panel which affirmed the present conviction on retrial and joined in the *per curiam* opinion holding that, on the record in this case, there was no reason for the trial judge to determine any issue relating to the informer. There is thus no occasion for this Court to review the Fifth Circuit's interpretation of its prior opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

MAY 1965.

U.S. GOVERNMENT PRINTING OFFICE : 1965